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OFFICE OF
UNITED STATES CHIEF OF COUNSEL
FOR PROSECUTION OF AXIS CRIMINALITY

A.P.O. 403

23 October 1945

TO: Major General William J. Donovan

FROM: Dr. Henry J. Kellermann *HJK (by E.A.)*

SUBJECT: Article 47 of the Military Penal Code

1. Nazi commentaries on Article 47 of the Military Penal Code, including the one by Schwinge, indicate that the National Socialist lawyer was seriously worried about the threat to the Fuehrer-prinzip and to military discipline implicit in a statute which permits, nay demands, disobedience to orders of superior officers. Characteristically, Mr. Schwinge attributes this dilemma to "the spirit of liberalism" and insists that the law was enforced "against the resistance of the Army." According to Mr. Schwinge, far from "watering down the duty to obey," Article 47 was intended "to enforce the performance of the duty to obey which is obligatory for the subordinate person."

2. Actually, there can be no doubt that Article 47 was intended to restore to the subordinate officer or non-commissioned officer not only the right of independent judgment and freedom of action but also the duty to act in accordance with his independent judgment. This was the case when his better judgment told him that the action demanded of him was in conflict with existing laws and was punishable under either civil or military statutes, i.e. the common Penal Code or the Military Penal Code.

3. Article 47 punishes three categories of persons:

(1) the officer (or non-commissioned officer) who gives an order which is in conflict with penal law; not only is the originator of such an order punishable but also everyone who transmits such an order to his subordinate officers or troops.

(2) the subordinate who goes beyond the authority of a criminal order, i.e. who acts in excess of the criminal order even if the criminality of this order was not or could not be apparent to him.

(3) the subordinate who executes the order in full knowledge of the fact that the order was intended to perpetrate a general crime or felony or such crimes or felonies as are punishable according to military penal law.

4. Thus, while the German military law was willing to overlook irregularities or minor misdemeanors if they were committed in execution of a regular military order given by a military commander and issued in proper form, it maintained that such leniency would not be applied to regular crimes or felonies. In other words, over and above the military duty to obey, there prevailed such general, ethical, international or national norms as were guaranteed and protected by the Penal Code and the Military Penal Code. The law thus expects the subordinate to maintain his ethical standards and to fall back on them, if and when he is ordered to abandon them for the purpose, known to him, of committing a crime or felony. According to prevailing opinion (including Mr. Schwinge's), it is not necessary for the subordinate to be cognizant of the legal implications or legal evaluation of the action; it is sufficient, according to Schwinge, if "the subordinate as a layman was aware of the fact that the order trespassed the framework of military conduct."

5. Schwinge points out, however, that in war standards vary from those existing in peacetime; thus an order which need not be followed in peacetime may be regarded as obligatory in wartime.

6. May I direct your attention to pp. 20-22 of Research and Analysis Report No. 3113.7 "The Nazi Party," Part IV, which discusses a similar problem with regard to the SS,